

**BEFORE THE COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND
SITTING AS THE DISTRICT COUNCIL FOR THE MARYLAND-
WASHINGTON REGIONAL DISTRICT IN
MONTGOMERY COUNTY, MARYLAND
Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue, Room 200
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:
NONCOMPLIANCE REVIEW OF
KAZ DEVELOPMENT, LLC (LMA G-858)
(Re-Zoning with Binding Elements)

Susan Scala-Demby, Zoning Manager
Department of Permitting Services

Seeking a Finding of Noncompliance

Kenneth Becker
Montgomery College Foundation
Perry Berman
Scheer Partners

Jody S. Kline, Esquire
Attorney for Montgomery College
Foundation (Property Owner)

In Support of a Finding of Noncompliance

Before: Martin L. Grossman, Hearing Examiner

SHOW CAUSE NO. G-858-SC
Re: LMA G-858 Noncompliance

**HEARING EXAMINER'S REPORT AND RECOMMENDATION ON SHOW CAUSE
PROCEEDING TO DETERMINE ALLEGATIONS OF NONCOMPLIANCE WITH THE
REZONING BINDING ELEMENTS**

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I. EXECUTIVE SUMMARY

Case No. & Date of Filing:	G-858-SC, filed February 28, 2011
Nature of the Case:	Noncompliance Review regarding failure to carry out binding elements imposed by the District Council in a 2007 rezoning of the subject site. Reversion to the R-60 Zone is sought as a sanction pursuant to Zoning Ordinance §59- H-2.53(i), based on noncompliance with the binding elements imposed in the rezoning (LMA G-858) by action of the District Council on September 11, 2007, in Resolution Number 16-290.
Zoning and Use Sought:	Reversion to R-60 Zone Use: Single-Family, Detached Homes
Current Zone and Use:	Zone: RT-12.5 Current Use: Townhouses are authorized in the Zone, but are not permitted due to a court decision which limits the use to single-family, detached homes, as prescribed in 1948 private covenants. Current use is therefore the use existing at the time of a 2007 rezoning – the MCAD building and parking.
Location:	10500 Georgia Avenue, in the northwest quadrant of Georgia Avenue and Evans Drive, in Silver Spring, Maryland
Applicable Master Plan:	Master Plan for the Communities of Kensington-Wheaton (May 1989, as amended April 1990).
Area of the Site:	2.53 acres
Issues:	Whether there has been noncompliance with the binding elements specified in the 2007 rezoning and whether the appropriate sanction is reversion from the RT-12.5 Zone back to the R-60.
Consistency with Master Plan:	The proposed R-60 Zone is consistent with the general objectives of the Kensington-Wheaton Master Plan for the area.
Response of the Community:	There has been no response from the community. The property owner, Montgomery College Foundation, supports the reversion to the R-60 Zone. Kaz Development LLC, the developer/applicant in the 2007 rezoning, no longer has an interest in the outcome. There has been no opposition.
Planning Board Recommends:	No recommendation
DPS Recommends:	Finding of Noncompliance/Reversion to the R-60 Zone
Technical Staff Recommends:	Finding of Noncompliance/Reversion to the R-60 Zone
Hearing Examiner Recommends:	Finding of Noncompliance/Reversion to the R-60 Zone

II. STATEMENT OF THE CASE AND BACKGROUND

The subject property (2.53 acres located in the northwest quadrant of Georgia Avenue and Evans Drive, in Silver Spring) was rezoned from the R-60 Zone to the RT-12.5 Zone in LMA G-858 (*In Re: Kaz Development, LLC*), by action of the District Council on September 11, 2007, in Resolution Number 16-290. Exhibit 5. In connection with this rezoning, binding elements were included in the Schematic Development Plan (SDP) approved by the District Council and recorded in the County's land records in a formal Declaration of Covenants. Exhibit 2. This report and recommendation reviews findings made by the Department of Permitting Services (DPS) on February 8, 2011, that there has not been compliance with these binding elements (Exhibit 1), and recommends action by the Council, pursuant to Zoning Ordinance §59- H-2.53(i).¹

The crux of this case is the conflict between the binding elements, which specify a townhouse use for the property, and private restrictive covenants,² in place since 1948, which restrict the use of the site to single-family detached residences. Exhibit 25(a). The private restrictive covenants were mentioned by the rezoning applicant's attorney in an April 17, 2007 e-mail to Technical Staff which was attached to the Technical Staff report in the 2007 rezoning case.³ In that e-mail, the developer's counsel stated:

In the 1940s, covenants were adopted for the Carroll Knolls Subdivision. The covenants contain restrictions which are outdated, have not been followed, and have been waived by many properties in the Carroll Knolls Subdivision, including the subject property. The restrictions in the Carroll Knolls Subdivision include: prohibition against non-residential uses; prohibition of the keeping of domestic animals including horses, cows, sheep goats on the property; and requiring properties be used for detached single family dwellings. The subject property has been used continuously as a non-residential use since 1948, including being used as a synagogue and now as Montgomery College's School of Art of Design. The covenants have never hindered the overt non-residential usage of the subject property. In fact, the County issued a special exception to the Maryland College of Art & Design, which was later voided as unnecessary once Montgomery College acquired the Property. Although the covenants have never hindered usage of the Property, as part of the Applicant's due diligence and for title purposes, it is asking the Circuit Court for Montgomery County to formally confirm that the covenants have been waived and are voided so that there is clarity in the land records. We expect the Court to review this case in the beginning of next year.

¹ The Hearing Examiner is not aware of any previous proceeding of this nature in this jurisdiction.

² The term "private restrictive covenants" as used in this sentence is not to be confused with the "covenants" which were filed by the Applicant as required under the optional method of rezoning. Zoning Ordinance §59-H-2.54. The zoning covenants incorporate the binding elements approved by the Council during the rezoning; while the restrictive private covenants operate independently of the zoning process.

³ The Hearing Examiner took official notice of the record in the 2007 rezoning matter. Tr. 5.

The private restrictive covenants were not considered in the 2007 rezoning proceedings because, under the controlling case law, such private covenants are not enforceable in rezoning proceedings; however, once a court actually rules on them, that ruling must be followed by the zoning authorities. As stated in *Perry v. County Board of Appeals for Montgomery County*, 211 Md. 294, 299-300, 127 A.2d 507 (Md. 1956),

The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attendant circumstances. Many times the covenant relied on may not have been originally effective or for many reasons, may have ceased to be effective at the time relief is sought. 2 *Rathkopf, The Law of Zoning and Planning*, p. 387, says: "The validity of the zoning ordinance, the grant of a variance or 'exception' should be considered independently of its effect upon covenants and restrictions in deeds."

* * *

Such private restrictions controlled by contract and real estate law are entirely independent of zoning and have no proper place in proceedings of this character, notwithstanding if in a proper proceeding the restrictions contended for are shown to be binding upon the properties mentioned, zoning cannot nullify them.

Kaz Development, LLC, the applicant in the 2007 rezoning case, did seek a ruling from the courts confirming that the private restrictive covenants had been waived. It succeeded in the Circuit Court in obtaining a February 6, 2008 judgment (Exhibit 4(a)), but that ruling was overturned by the Maryland Court of Special Appeals on February 9, 2009. *Theresa Jackson et al. v. Kaz Development, LLC*, Case No. 3019 (Unreported Opinion). Exhibit 4(b).

The result of the final appellate court decision is that the 1948 private restrictive covenants remain in place and prevent development of the townhouses required by the binding elements and rezoning covenants filed in the 2007 rezoning case. The owner of the subject site, Montgomery College Foundation, reported this problem to the Department of Permitting Services (DPS) in a letter from its attorney, Jody Kline, Esquire, dated December 15, 2010. Exhibit 1(a). The owner seeks reversion of the property to the R-60 Zone so it can be efficiently

developed with single-family detached homes in accordance with the restrictive private covenants. The developer-applicant in the 2007 rezoning case, Kaz Development, LLC, has terminated its contract with Montgomery College Foundation and has no further interest in the property. Exhibits 17 and 23.

The procedure to be followed in this kind of situation is outlined broadly in Zoning Ordinance §59-H-2.53(i), which provides:

*(i) **Compliance with binding elements.** The binding elements approved by the district council are binding upon the applicants, successors, and assigns, unless amended in accordance with the provisions of Section 59-D-1.7.*

(1) Allegations of noncompliance. Whenever a complaint is filed alleging substantial noncompliance with any or all of the binding elements of an approved schematic development plan, the director must investigate the complaint and, if the complaint is found to have reasonable cause, provide a written summary of the investigation to the complaining party, the zoning applicant or a successor in interest, the Planning Board, and the zoning hearing examiner. Complaints may be filed by government agencies and individuals.

(2) Upon receipt of the director's investigative report, the hearing examiner must schedule a show cause hearing to determine whether noncompliance with the binding elements exists and whether it merits sanctions including reversion to the previous zoning category. The hearing will be conducted after providing the parties and the public with 30 days' notice. The hearing examiner must provide the District Council with a report and recommendation within 30 days after the close of the hearing record. A hearing is not required if the complaint is withdrawn or the alleged noncompliance is corrected to the satisfaction of the director.

(3) If the District Council finds, after consideration of the hearing examiner's report and recommendation, that noncompliance exists with respect to any or all of the binding elements of an approved schematic development plan, it may adopt a resolution providing appropriate sanctions including reversion of the zoning to the previous zoning classification applicable to the property. Upon reversion to the previous zoning classification, the property will be subject to all development standards of the previous zone. The reversion sanction will not apply where the District Council finds substantial compliance with the binding elements.

Upon receipt of the letter dated February 8, 2011, from Susan Scala-Demby, Zoning

Manager for the Department of Permitting Services, the Hearing Examiner issued a Notice of Show Cause Hearing establishing a hearing date of June 17, 2011, and directing the property owner, Montgomery College Foundation and the rezoning applicant, KAZ Development LLC, and any party claiming through them, “to show cause whether there is noncompliance with the binding elements of the schematic development plan (SDP) approved by the District Council on September 11, 2007, in Resolution Number 16-290, and whether it merits sanctions, including reversion to the previous zoning category.” Exhibit 6.

This February 28, 2011, notice was sent to the parties to the 2007 rezoning case, local civic associations, adjoining and confronting property owners, the County Attorney, the Council’s Staff Attorney, DPS, the Montgomery County Planning Board and the Planning Board’s Technical Staff. It was also published in two newspapers of general circulation in the County. Exhibits 7 and 8.

The only responses to the notice were from Jody Kline, the attorney for Montgomery College Foundation (Exhibit 9), and Technical Staff of the Maryland-National Capital Park and Planning Commission. Exhibit 20. Technical Staff’s letter of June 13, 2011, contained only one paragraph of substance:

In response to your inquiry regarding the Show Cause hearing for G-858, staff does not see any way that the applicant can meet the binding elements that were placed on this property as a result of the rezoning to RT-15. Since the highest Court in Maryland⁴ has found that the covenant restricting development on the property to single family detached dwelling units is valid, until such time as the beneficiaries of the covenant release their rights, the Property cannot be developed in accordance with the approved Development Plan. Moreover, staff can think of no other remedy than to return the property to its original zoning, which was R-60.

The Hearing Examiner contacted Ms. Scala-Demby, who agreed to appear at the hearing on behalf of DPS. The Hearing Examiner also subpoenaed Victor M. Kazanjian, Kaz

⁴ Actually, the ruling was by the second highest court in Maryland, but it is a final decision.

Development's Manager. Mr. Kazanjian asked to be released from the subpoena because Kaz Development, LLC terminated its contract with Montgomery College Foundation in 2009 and has no further interest in the property, "financial or otherwise." Exhibits 17. After all the other responding parties indicated that they saw no need to require Mr. Kazanjian's attendance at the hearing, the Hearing Examiner released the subpoena. Exhibits 16 – 19.

The hearing proceeded as scheduled on June 17, 2011. Ms. Scala-Demby testified on behalf of DPS, and Montgomery College Foundation called two witnesses, Kenneth Becker, a member of the Foundation's Board of Directors, and Perry Berman, a land use planner and real estate agent hired by the Foundation to market and sell the property in question. The record was held open until June 27, 2011, to receive a copy of the 1948 restrictive covenants and the transcript. It closed as scheduled. There is no opposition in this case.

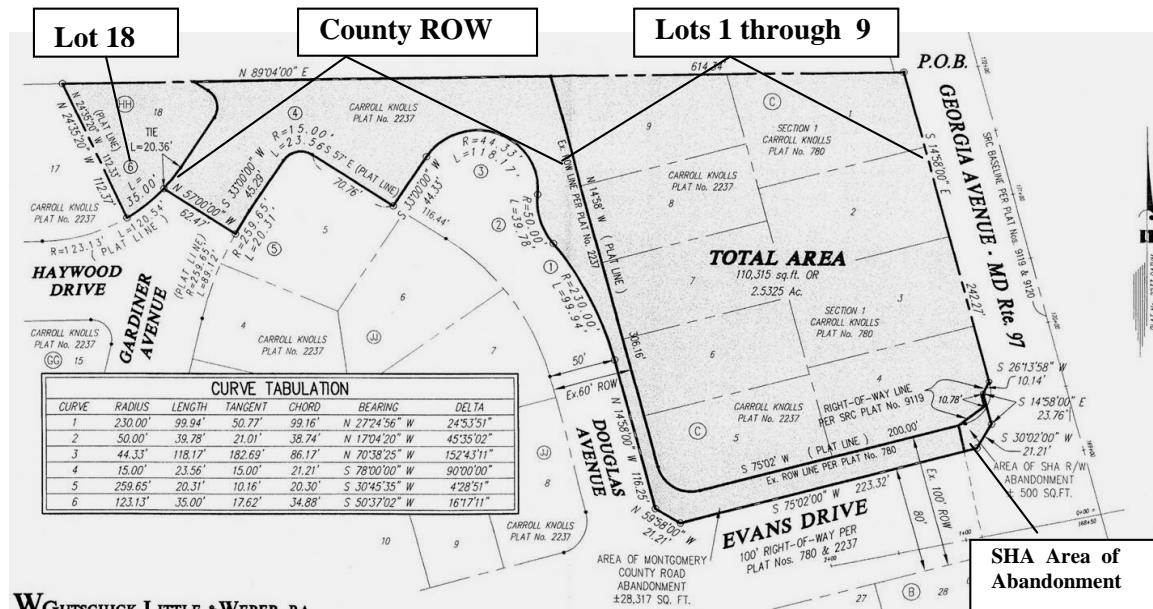
III. SUBJECT PROPERTY AND SURROUNDING AREA

The following description of the subject property and surrounding area is copied from the Hearing Examiner's report leading to the 2007 rezoning.⁵ As mentioned, the Hearing Examiner took official notice of the entire record in that rezoning case. Although the present case is not designated a rezoning case, it could result in a reversion back to the original R-60 Zone, so it is appropriate to give the Council some background concerning the subject site and its surrounding neighborhood.

The subject property, which has an area of about 110,315 square feet (2.53 acres), is located at 10500 Georgia Avenue, in the northwest quadrant of Georgia Avenue and Evans Drive, in Silver Spring. It is comprised of Lots 1 - 9 in Block C, Lot 18 in Block H-H, and portions of

⁵ To avoid confusion, references to exhibit numbers in the 2007 rezoning report have been removed, and some language has been modified and updated.

adjacent rights-of-way which were to be abandoned by the State and County, all in the Carroll Knolls Subdivision. Although the County approved the proposed abandonments (Exhibits 22(a), (b) and (c)), they never went into effect because post-approval conditions were not met.⁶ Tr. 22-24; 31-32. The total area of the rezoning is shown below on the Plat Map:



Technical Staff reports that the intersection of Georgia Avenue and Plyer's Mill Road is 900 feet to the north. The Wheaton Metro Station is about 4000 feet to the north, and the Forest Glen Metro Station is about same distance to the south. The subject property is irregular in shape and fairly flat. The eastern portion (Lots 1 through 9), where the townhouse development had been proposed, is roughly rectangular. The western portion (Lot 18 and the County right-of-way), which is forested and contains wetlands, is highly irregular in shape. A storm drain easement runs diagonally through the property. The property has about 242.27 feet of frontage along Georgia Avenue and 223.32 feet along Evans Drive. The eastern portion of the property (Lots 1

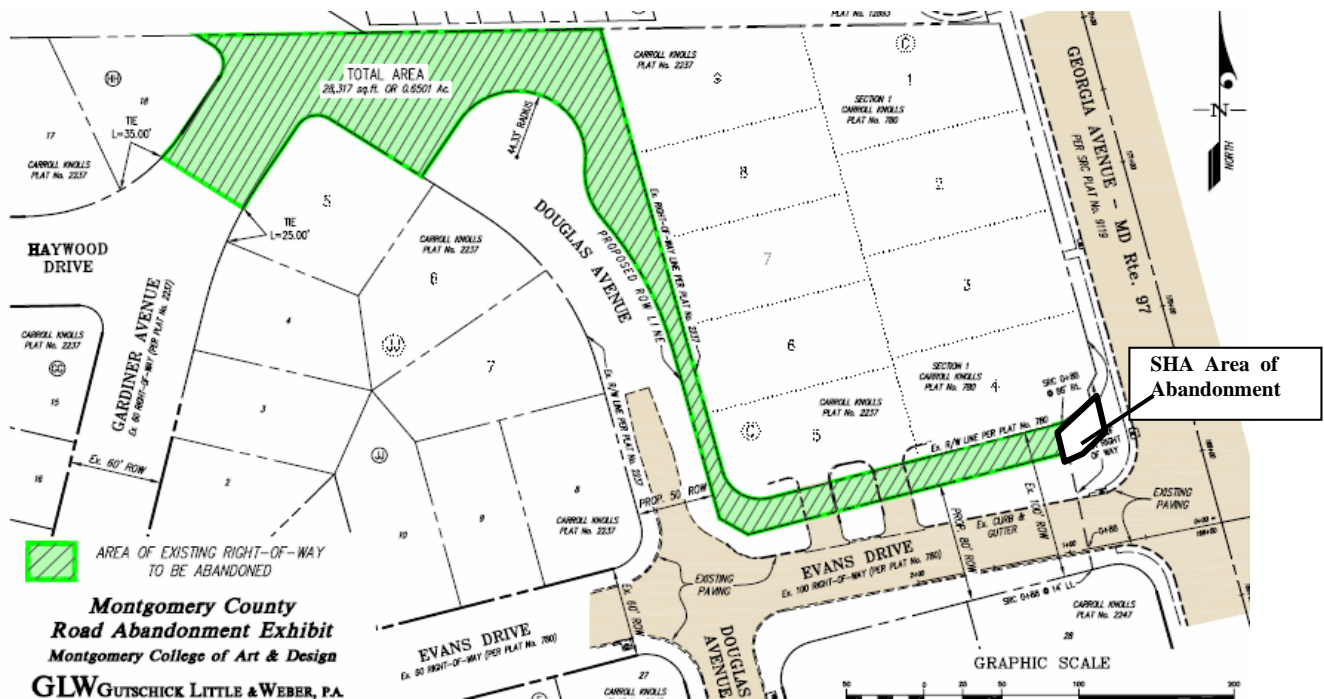
⁶ Paragraph two on page 2 of each resolution specifies that the abandonment shall not become effective until, within 24 months after the date of the abandonment, a new record plat of abandonment is recorded assembling the land into lots or HOA parcels, and until the applicant obtains an approved preliminary plan of development. Those steps were not taken within the specified 24 month period, and the abandonment resolutions have thus expired. Tr. 22-25; 31-32.

through 9) contains the Montgomery College of Art and Design (MCAD), which is a one-story institutional building of approximately 13,500 square feet with a 60-car parking lot, lawn, and some perimeter landscaping. The site and its neighborhood are shown below in an aerial photo attached to the rezoning Technical Staff report, and in a panoramic photo.



Lots 1 through 9 and Lot 18 are owned by Montgomery College Foundation, Inc. The

County rights-of-way that had been designated for abandonment are shown below as a hatched area on the exhibit. The SHA abandonment area has also been denoted by the Hearing Examiner on the Exhibit. Since the abandonments never went into effect, the original lot configuration will remain, and if the Council restores the R-60 Zone to the site, Montgomery College Foundation will develop the lots in accordance with the way they are platted today. Tr. 25-26.



Currently, vehicular access to the subject property is via Evans Drive, a primary residential road with a 100-foot right-of-way. Evans Drive connects to Georgia Avenue (MD 97), which is a major highway with a 120-foot right of way and six travel lanes. The intersection of Georgia Avenue and Evans drive is not signalized, but in the part of Georgia Avenue adjacent to the subject property, there is a median. There is pedestrian access to the site from a “lead walk,” off of the sidewalk that runs along the Georgia Avenue frontage. The Georgia Avenue sidewalk immediately abuts the street, and no tree panels separate it from the roadway. There is also a footpath that runs through the western undeveloped portion of the property.

The surrounding area, as defined in the 2007 rezoning case, is shown below:



Technical Staff describes the surrounding area in its 2007 rezoning report as follows:

The defined surrounding area is mainly developed with single-family homes on land zoned R-60, plus townhomes to the north of the subject property on land zoned R-T 15 and R-T 12.5. The single-family homes to the west of Georgia Avenue are located within the Plyers Mill Estates subdivision and the Carroll Knolls subdivision. The single-family homes within the surrounding area to the east of Georgia Avenue are within the Glenview and Evans Parkway subdivisions. The townhouse development right at the corner of Plyers Mill Road and Georgia Avenue is zoned R-T 15 and has 30 lots on 81,467 s.f (1.87 acres) of land, for an approximate density of about 16 units per acre. The older townhouse development that surrounds the corner townhouse development to the south and west has 93 lots on 328,599 s.f (7.54 acres), for an approximate density of 12 units per acre. Both of these townhouse developments were once on land zoned R-60, and were rezoned pursuant to Zoning Applications G-786 (adopted 3/27/2001) for the northernmost development, and F-951 (adopted 9/21/76) for the southernmost, older development.

Also within the surrounding area is a church in the southeast quadrant of Georgia Avenue and Plyers Mill Road on land zoned R-60. Directly opposite the subject property to the east, across Georgia Avenue, is the Evans Parkway Neighborhood Park, which was recently expanded to include the parcel at the corner of Georgia and Evans Parkway.⁷

Some of the features surrounding the subject site are shown below:



IV. ZONING HISTORY AND MASTER PLAN

The subject property was classified under the R-60 Zone in the 1958 Countywide Comprehensive Zoning. The R-60 Zone was reconfirmed by Sectional Map Amendments (SMA) G-136 and 137 (10/24/78); SMA G-744 (6/24/97); SMA G-761 (7/14/98); and SMA G-795 (4/16/02). The site was granted a special exception, S-493, on August 4, 1976, to run a private educational institution (MCAD). The Board of Appeals revoked the special exception in 2004, because Montgomery College, which acquired the property, is a public entity and does not need a

⁷ Montgomery College Foundation, Inc., also owned three vacant lots west of Douglas Avenue, across from the subject site, at the time of the 2007 rezoning. They were not part of that application, and the record in this review does not reflect their present ownership.

special exception to operate a school in the R-60 Zone. The subject property was rezoned from the R-60 Zone to the RT-12.5 Zone in LMA G-858 (*In Re: Kaz Development, LLC*), by action of the District Council on September 11, 2007, in Resolution Number 16-290.

The MCAD site is located in the area subject to the *Master Plan for the Communities of Kensington-Wheaton* (May 1989, as amended April 1990). The Master Plan makes no site-specific recommendation for the site, other than to show it as “quasi public” on its Land Use Plan, presumably because MCAD was located there. The Master Plan, in general, recommends low-to-medium density residential use for the area around the subject site.

On page 28 of the Master Plan, the goals and objectives include protecting and stabilizing the extent, location and character of existing residential and commercial land uses. The objective is to maintain the well-established, low and medium density residential character, which prevails over most of the planning area, and preserve the identity of residential areas along major highway corridors, to soften the impact of major highways on adjacent homes.

Some of the key land use indicators are referred to on page 18 of the Master Plan. Existing land use is predominantly low-density, single family residential, except for major intersections along the corridor. The Master Plan recommends that residential areas along major highways should be reinforced and protected by a land use and landscaping approach called “green corridors.” Plan page 70.

The Master Plan (page 36) seeks to protect water quality of the streams, and to prevent erosion and flood damage in the Kensington/Wheaton area. It also seeks to promote the conservation of selected areas in their natural undeveloped state, with active recreation uses in some instances.

Community-Based Planning (CBP) Staff also analyzed the rezoning application in a

memorandum dated May 2, 2007. CBP Staff, in concluding that the rezoning application was consistent with the Master Plan, pointed out that:

The return of the college property to residential uses conforms to the Plan's objective of redevelopment that stabilizes and maintains the residential character of this portion of Georgia Avenue. It will also help to preserve the existing generally residential identity of the area.

The Hearing Examiner notes that this evaluation is consistent with either the 2007 rezoning to the RT-12.5 Zone or the reversion back to the R-60 Zone.

V. THE BINDING ELEMENTS FROM THE 2007 REZONING

The subject site was rezoned to RT -12.5 in 2007, pursuant to the "optional method" of application permitted under Code § 59-H-2.52. The optional method requires submission of a schematic development plan (SDP) that specifies which elements of the plan are illustrative and which are binding, *i.e.*, elements to which the Applicant consents to be legally bound. Those elements designated by the Applicant as binding must be set forth in a Declaration of Covenants to be filed in the county land records if rezoning is approved. The Declaration of Covenants (Exhibit 2) was filed in the county land records, as required.

The legal effect of the covenants is to obligate any future owner of the property to comply with the binding elements specified on the SDP. Thus, the optional method allows an applicant to specify elements of its proposal that the community, reviewing agencies and the District Council can rely on as legally binding commitments. Illustrative elements of the SDP may be changed during site plan review, but the binding elements cannot be changed without a separate application to the District Council for a schematic development plan amendment. The failure to comply with the binding elements due to the previously mentioned appellate court decision resulted in this show-cause proceeding. The binding elements, as listed on the revised SDP approved by the

Council (Exhibit 21), and in the Covenants filed pursuant to the rezoning (Exhibit 2), are reproduced below.⁸

Binding Elements - IN ADDITION TO THOSE SHOWN IN THE ZONING STANDARDS TABLE:

1. TOWNHOUSE UNITS THAT FACE ON A PUBLIC RIGHT-OF-WAY SHALL HAVE BRICK FRONTS, AND THE END UNITS OF EACH ROW OF TOWNHOUSES THAT FACE ON A PUBLIC RIGHT-OF-WAY SHALL HAVE BRICK SIDES AS WELL.
2. ALL STREET TREES INSTALLED WITHIN THE PUBLIC RIGHT-OF-WAY AROUND THE PERIMETER OF THE SITE SHALL BE A MINIMUM OF 3-1/2" CAL. AT INSTALLATION.
3. LANDSCAPE BUFFER AND OR FENCING SHALL BE INSTALLED ALONG THE NORTHERN PROPERTY LINE BETWEEN GEORGIA AVENUE AND DOUGLAS AVENUE. FINAL DESIGN SHALL BE DETERMINED AT THE TIME OF SITE PLAN
4. CONSTRUCT A PEDESTRIAN CONNECTION FROM THE END OF DOUGLAS AVENUE TO THE COMMUNITY TO THE NORTH WITH THE WIDTH AND LOCATION TO BE DETERMINED AT SITE PLAN.
5. AT THE TIME OF RECORD PLAT, DEDICATE OR PROVIDE A 20' PUBLIC USE EASEMENT FROM END OF DOUGLAS AVENUE TO NORTHERN PROPERTY LINE.
6. USE - TOWNHOUSE
7. PROVIDE A PEDESTRIAN CROSSWALK ACROSS GEORGIA AVENUE AT EVANS DRIVE, SUBJECT TO DPW&T AND SHA APPROVAL (IF DPW&T AND SHA DO NOT APPROVE THE CROSSWALK, THEN NO CROSSWALK IS REQUIRED). THIS CROSSING WILL INCLUDE A PEDESTRIAN REFUGE ISLAND IN THE MEDIAN, ALONG WITH THE APPROPRIATE CURB DEPRESSIONS AND RAMPS TO COMPLY WITH ADA REQUIREMENTS FOR THE CROSSING. SUBJECT TO DPW&T AND SHA APPROVAL.
8. IN ACCORDANCE WITH 'STAFF GUIDELINES FOR THE CONSIDERATION OF TRANSPORTATION NOISE IMPACTS IN LAND USE PLANNING AND DEVELOPMENT', BUILDING ENVELOPES WILL BE DESIGNED TO ALLOW THE AVERAGE INTERIOR DNL TO BE REDUCED TO 45 dBA[Ldn] OR LOWER, AND PROJECTED EXTERIOR DNL FOR UNIT REAR DECK OR PATIO SPACES WILL BE 65 dBA[Ldn] OR BELOW.
9. APPLICANT WILL ALLOW PUBLIC ACCESS TO THE FOREST CONSERVATION EASEMENT AREA TO THE EXTENT ALLOWED BY THE MARYLAND-NATIONAL CAPITAL PARK & PLANNING COMMISSION STAFF, WITH SUCH ACCESS BEING DETERMINED AT SITE PLAN.

As is evident, Binding Element 6 restricts the use to "Townhouse." That use cannot be carried out given the court's upholding of the 1948 restrictive covenants (Exhibit 25(a), p.2), which specify, *inter alia*,

* * *

(A) All lots in the aforementioned subdivisions shall be used, known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residential building plat other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage for not more than two cars and other outbuildings incidental to the residential use of the plot. [Emphasis added.]

* * *

⁸ One additional binding element is listed in the SDP's Development Standards Table, establishing the maximum density of 27 dwelling units , including 12.5% MPDUs. Thus, the Covenants list a total of 10 binding elements.

VI. SUMMARY OF THE HEARING

The hearing proceeded as scheduled on June 17, 2011. At the beginning of the hearing, the Hearing Examiner took official notice of the entire record in LMA G-858, the rezoning case which gave rise to the binding elements at issue in this case. Tr. 5. Susan Scala-Demby testified on behalf of DPS, and Montgomery College Foundation called two witnesses, Kenneth Becker, a member of the Foundation's Board of Directors, and Perry Berman, a land use planner and real estate agent hired by the Foundation to market and sell the property in question. The record was held open until June 27, 2011, to receive a copy of the 1948 restrictive covenants requested by the Hearing Examiner (Tr. 13) and the transcript.

A. Department of Permitting Services Case

Susan Scala-Demby (Tr. 6-14):

Susan Scala-Demby testified that she is the Zoning Manager for the Department of Permitting Services (DPS). Ms. Scala-Demby identified her letter of February 8, 2011 (Exhibit 1), and its attachments – a letter to DPS from Jody Kline, dated December 15, 2010 (Exhibit 1(a)); the Declaration of Covenants filed in the rezoning case (Exhibit 2); an aerial photo of the subject site (Exhibit 3); the order from the Circuit Court entered February 6, 2008 (Exhibit 4(a)); the Maryland Court of Special Appeals Opinion (Exhibit 4(b)); and a copy of the Council's Resolution 16-290 (Exhibit 5).

Ms. Scala-Demby testified that she looked through and read these documents and spoke with DPS's attorney, in determining that there was a legal impossibility to implement the approved site development plan. She so found because the Court of Special Appeals reversed a ruling of the Circuit Court and declared the 1948 covenant that restricts the use of lots within the Carroll Knolls Community to be still valid and enforceable.

Those private covenants provide that all of the lots were to be used as residential lots. No structure could remain on any residential building plat other than one detached, single-family dwelling, not to exceed two and a half stories in height, and a private garage for not more than two cars and other out buildings.

Ms. Scala-Demby's conclusion as a result of the covenants being upheld is that the rezoning development plan approved by the Council was not valid, and that it had to revert back to the zoning in effect back in 1948, the R-60 zone. When asked by the Hearing Examiner whether there were remedies that could occur other than reverting to the original zone, Ms. Scala-Demby had no other suggestions. DPS recommends reversion back to the R-60 zone as the remedy.

B. Property Owner's Case

1. Kenneth Becker (Tr. 14-28):

[Attorney Jody Kline introduced Exhibit 21, a certified copy of the Schematic Development Plan (SDP) approved by the Council's Resolution 16-290 on September 11, 2007, in LMA G-858. Tr. 14.]

Kenneth Becker testified that he is a member of the Montgomery College Foundation's Board of Directors and has been such since 2005. He also serves on the Board's Entrepreneurial and Real Estate Projects Committee, and in that capacity has been tasked with representing the Foundation concerning this matter. He is therefore testifying on behalf of Montgomery College Foundation, the owner of the subject parcel.

The Montgomery College Foundation was established in 1982 as a 501(c)(3) charitable organization. It's governed by a 21 member board of directors made up of business alumni and community leaders to enhance and support the mission of Montgomery College. This mission

includes ongoing financial support for the physical infrastructure of the college's three campuses and fundraising in support of scholarship aid for Montgomery College students for which there continues to be demand in excess of resources.

Montgomery College assumed operational control of the Maryland College of Art and Design in the early 2000s. It completed a planned transfer of that institution's activities and converted them over to the Montgomery College's Takoma Park Campus in 2004. At that time, the land and building was conveyed to Montgomery College which subsequently assigned it to the Montgomery College Foundation for disposition and administration of proceeds for the benefit of the college. The Foundation's goal and its fiduciary responsibility throughout this process has been to maximize the value of this asset and dispose of it.

The Foundation is actually the record owner of title to the subject property. Kaz Development, LLC, had a contract to purchase the land, contingent upon its ability to develop the property at a density necessary to support the purchase price, which would be a townhouse development. Although the zoning was approved, the litigation restricting the land use by covenant prevented the contingency from being fully satisfied and gave Kaz the opportunity to terminate its rights under the contract. Kaz did terminate the contract by a document signed October 5, 2009 (Exhibit 23). There was no dispute between the Foundation and Kaz as to their right to terminate their relationship.

Following this contract termination, the Foundation board again sought to renew its disposition efforts. But following discussions with its designated land broker, its engineering consultants and counsel, the Foundation determined that the approved zoning and binding elements of that zoning were in fact prohibited following the court's validation of the previously unenforced land use covenant. A determination was made to advise DPS of the Foundation's

inability to comply with the terms of the zoning of the subject site, including all the binding elements under the approved plan, thus remaining in non-compliance with all such requirements without the possibility of compliance.

This state of “limbo” has inhibited the Foundation’s ability to market the property and actually get an offer to buy the property. Tr. 21. There was great difficulty in determining the property’s value because it was hard to determine what can be done with this land in this very muddled state of approvable uses. The Foundation’s goal is therefore to have the zoning revert to the R-60 Zone, because that would clear up the issues associated with the marketing of the property. Tr. 21-22.

[Mr. Kline introduced three resolutions of the County Council abandoning streets, which on the schematic development plan, Exhibit No. 21, abut the subject property and were incorporated within the limits of the area that was rezoned to the RT-12.5.] It is Mr. Becker’s understanding that the state abandonment was never completed, and the County abandonments, which were approved, were never ratified. [The County abandonments were marked as Exhibits 22 (a), (b) and (c) corresponding to County Council Resolutions 16-233, 16-234 and 16-235. All are dated July 3, 2007. Mr. Kline pointed out that in each of the resolutions there is a paragraph two on page 2 of the resolutions, which specifies that the abandonment shall not become effective until, within 24 months after the date of the abandonment, a new record plat of abandonment is recorded assembling the land into the townhouse community, and until a preliminary plan of development is approved. Mr. Kline proffered that those steps have never been taken. In his opinion, these abandonments, even though approved by the Council, did not become effective. They’ve expired because the preliminary plan at subdivision was not recorded within 24 months. Mr. Kline further stated that the abandonments were only essential to the

implementation of the schematic development plan. What the Foundation now wants to do is go back to the original lot configuration and just develop the lots in accordance with the way they're platted today. Tr. 22-25]

2. Perry Berman (Tr. 28-40):

Perry Berman testified that he is a commercial real estate agent with Scheer Partners at 9713 Key West Avenue, Gaithersburg, Maryland. He was engaged by the Foundation in March of 2010 to market and sell the subject property.

Mr. Berman stated that in his initial inquiries in the marketplace, potential developers were exceptionally confused by the conflict between the private covenant and the zoning. "None of them had ever seen this kind of conflict before. None of them were interested in trying to resolve it. None of them knew how to resolve it. And they all felt it was extremely valuable property. They were all very interested. If we ever cleared it up, they would be very interested in proceeding. But given the problems, they were uninterested." Tr. 31.

Mr. Berman testified that no preliminary plan of subdivision incorporating the abandoned right of way into a new 27 lot layout has ever occurred. Tr. 31-32.

Mr. Berman described his experience working with the Park and Planning Commission, his last official title being Chief of Community Planning. For 20 years, he was the supervising planner for the Kensington/Wheaton Master Plan, and reviewed many zoning and subdivision cases. Today he serves as a consultant on these issues. Mr. Berman testified that as a Park and Planning Commission employee over 28 years, he had never seen anything like this situation. A lot of people have looked at it and have not come up with any solution other than reversion back to the R-60 Zone. He also knows of no other solution and believes reversion is the appropriate one. Tr. 34.

[Nevertheless, Mr. Kline noted that there is one other possible route. The Zoning Ordinance does allow one to build single-family houses in the RT-12.5 zone. It says, however, they are subject to the R-60 zone standards. Mr. Kline feels that such a project would be a practical impossibility because projects in the RT Zones have to go through the site plan review process, which would be an unusual process for 10 single-family houses that normally can be built as a matter of right in the R-60 Zone. Questions would arise as to how to apply the R-60 Zone standards in a RT-12.5 Zone through the site plan route. The traditional, conventional development industry will have trouble understanding why it is building single-family houses on townhouse zoned land. Moreover, the costs and delays of going through a revised schematic development plan review, possibly a hearing pertaining thereto and site plan review, all to build 10 single-family homes, would make it unattractive for developers. Tr. 35-36.]

Mr. Berman testified that a fair summary of Mr. Kline's statement is that there is another possible legal way to handle this but it's not practical, and it would end up being much, much more costly and still doesn't eliminate the issue of attractiveness to developers. It's not a viable solution. For example, if a property owner wanted to put a porch on his house, he might have to go through a site plan amendment. Mr. Berman feels that a builder would look at the situation and conclude that he can't live with that kind of potential. Tr. 37-38.

[Mr. Kline added that it is in the public interest to have the property revert to its original R-60 zoning because it is the cleanest process and would allow the Foundation to maximize the yield of the property so it can underwrite the college's operations. That would yield a public benefit. He agreed that the Council's resolution should not only reverse the rezoning but void the rezoning declaration of covenants. Tr. 38-40.]

VII. ANALYSIS AND CONCLUSIONS

The undisputed evidence in this case is that the binding elements imposed by the District Council on September 11, 2007, in Resolution Number 16-290, as part of the approval of the rezoning of the subject site from R-60 to RT 12.5, have not been, and cannot be, carried out. Although most of the binding elements reproduced on page 15 of this report do not refer to the townhouse configuration, Binding Element 6, which limits the development to a townhouse use, clearly is the central tenet of the binding elements and controls the nature of any prospective development. No development has occurred on the site since the rezoning because the 1948 restrictive private covenants do not permit a townhouse use, and thus none of the binding elements have been carried out.

In sum, the Hearing Examiner finds that there has not been compliance with the binding elements, and there is no prospect that there will be compliance because the 1948 restrictive private covenants, upheld by the Maryland courts, required single-family detached housing and the binding elements call for townhouses. This finding is supported by DPS, Technical Staff and the evidence produced at the hearing, as detailed elsewhere in this report.

The only other substantive question is what is the appropriate remedy. Zoning Ordinance §59-H-2.53(i)(3) permits (but does not require) the Council, upon a finding of substantial noncompliance, to order reversion to the R-60 Zone.⁹ The Section provides:

If the District Council finds, after consideration of the hearing examiner's report and recommendation, that noncompliance exists with respect to any or all of the binding elements of an approved schematic development plan, it may adopt a resolution providing appropriate sanctions including reversion of the zoning to the previous zoning classification applicable to the property. Upon reversion to the previous zoning classification, the property will be subject to all development

⁹ The Maryland “change/mistake” rule, as outlined in *Stratakis v. Beauchamp*, 268 Md. 643, 652-53, 304 A.2d 244, 249 (1973), does not apply here because there is no effort to vary from the 1958 comprehensive zoning which classified the site and the surrounding area into the R-60 Zone. Rather, this is a statutorily authorized procedure to undo a recent local map amendment which reclassified the site to a floating zone.

standards of the previous zone. The reversion sanction will not apply where the District Council finds substantial compliance with the binding elements.

As discussed above, there clearly was not substantial compliance with the binding elements. Both DPS and Technical Staff recommended, as the appropriate remedy, that the Council order reversion to the R-60 Zone, and they proposed no other alternatives. Exhibit 20 and Tr. 10-11. Jody Kline, counsel for the property owner, candidly admitted that there is one other option, though it is impractical and is not favored by any party to this action. Tr. 35-40.

The Zoning Ordinance does allow one to build single-family houses in the RT-12.5 zone. It says, however, they are subject to the R-60 zone standards. Zoning Ordinance §59-C-1.71(a), fn. 1. Thus, theoretically, the RT 12.5 Zone could remain in place and the SDP amended to call for detached homes. The binding elements, both on the SDP and in the covenants filed after the rezoning in 2007, would have to be correspondingly changed.

Mr. Kline noted that such a project would be a practical impossibility because projects in the RT Zones have to go through the site plan review process, which would be an unusual process for 10 single-family houses that normally can be built as a matter of right in the R-60 Zone. Questions would arise as to how to apply the R-60 Zone standards in an RT-12.5 Zone through the site plan route. The traditional, conventional development industry would have trouble understanding why it is building single-family houses on townhouse zoned land. Moreover, the costs and delays of going through a revised schematic development plan review, possibly a hearing pertaining thereto and site plan review, all to build 10 single-family homes, would make it unattractive for developers. Tr. 35-36.

The Montgomery College Foundation's real estate agent, Perry Berman, agreed that although there is another possible legal way to handle this matter, it is not practical, and it would end up being much, much more costly without eliminating the issue of attractiveness to

developers. It thus is not a viable solution. For example, if a property owner wanted to put a porch on his house, he might have to go through a site plan amendment. Mr. Berman feels that a builder would look at the situation and conclude that it could not live with that kind of potential. Tr. 37-38.

There was no opposition and no contrary evidence presented in this case, and the Hearing Examiner therefore finds that the appropriate remedy, which is specifically authorized by Zoning Ordinance §59-H-2.53(i)(3), is reversion back to the R-60 Zone. To effectuate this remedy, the Council should also declare the binding elements and related materials in both the SDP and the covenants filed in connection with the 2007 rezoning to be null and void. In order to ensure that the County's land records reflect the voiding of the previously filed rezoning covenants, the Council's resolution should require the property owner, Montgomery College Foundation, to submit satisfactory evidence to the Hearing Examiner that it has filed a copy of the Council's Resolution in the land records of Montgomery County, Maryland, within 20 days of its issuance.

As observed by Mr. Kline, this remedy would be in the public interest because it would allow the Foundation to maximize the yield of the property so it can underwrite more of the college's operations. He agreed that the Council's resolution should not only reverse the rezoning but void the rezoning declaration of covenants. Tr. 38-40. The Hearing Examiner notes that the reversion to the R-60 Zone is also in the public interest because it corrects the noncompliance with the binding elements approved by the Council in connection with the 2007 rezoning and would result in a development which is consistent with the Kensington-Wheaton Master Plan's goal of maintaining the well-established, low and medium density residential character of the area.

Based on the foregoing analysis and after a thorough review of the entire record, I reach the following conclusions:

1. There has not been substantial compliance with the binding elements of the 2007 rezoning, and there is no prospect that there will be compliance;
2. The only practical remedy is reversion of the land back to the R-60 Zone and voiding of the binding elements and related materials in both the SDP and the covenants filed in connection with the 2007 rezoning;
3. The requested reversion to the R-60 Zone would be in the public interest; and
4. The Council is authorized to take this action pursuant to Zoning Ordinance §59-H-2.53(i)(3).

VIII. RECOMMENDATION

I, therefore, recommend that the Council find substantial non-compliance with the binding elements imposed on September 11, 2007, by Council Resolution Number 16-290, in LMA No. G-858, **and that the subject site**, consisting of 2.53 acres of land known as Lots 1 - 9, Block C, Lot 18, Block H-H, and portions of adjacent rights-of-way previously proposed to be abandoned by the State and County, and located at 10500 Georgia Avenue in Silver Spring, on the site of the Montgomery College of Art and Design, in the Carroll Knolls Subdivision of Silver Spring, which were reclassified by the aforementioned Resolution from the R-60 Zone to the R-T 12.5 Zone, **be reverted back to the R-60 Zone**; that the property be henceforth subject to all development standards of the R-60 Zone; **and that the binding elements** and related materials in both the SDP accompanying the rezoning and the covenants filed in connection with the rezoning **be declared null and void**; provided that the property owner, Montgomery College Foundation, submits to the Hearing Examiner, satisfactory evidence that it has filed a copy of the Resolution in the land records of Montgomery County, Maryland, within 20 days of its issuance.

Dated: July 20, 2011

Respectfully submitted,

Martin L. Grossman
Hearing Examiner